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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 642

THE CINCINNATI GAS & ELECTRIC COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The findings and order of the Federal Power Commission (R. 1123) are reported as *The Ohio Fuel Gas Company,* 15 F. P. C. 1623, 14 P. U. R. (3d) 266. The Commission's Findings and its Order Denying Applications for Rehearing, etc., are set out in the record at R. 1161, *et seq.* The opinion of the Court of Appeals (Pet. App. 1a) is reported at 247 F. 2d 556 and states that the petition for review was dismissed for the reasons set forth in *Cincinnati Gas & Electric Company, et al.* v. *Federal Power Commission,* 246 F. 2d 688 (Pet. App. 2a–14a).

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1957 (R. 1226). A petition for rehearing, timely filed, was denied on September 9, 1957 (R. 1231). The petition for a writ of certiorari was filed on December 5, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner, a distributor of natural gas, was "aggrieved" by an order of the Federal Power Commission authorizing the substitution by one of its suppliers of a long-term contract-demand rate form for petitioner's existing commitment under a one-year average daily-demand rate form.

2. Whether, even if petitioner was "aggrieved" by this order and may therefore challenge it, the order should be upheld as valid.

STATUTE INVOLVED

Section 19 (b) of the Natural Gas Act, 15 U. S. C. 717r (b), provides in pertinent part:

> Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order * * * in the United States Court of Appeals for the District of Columbia Circuit by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * *

STATEMENT

Petitioner, a retail distributor of natural gas, sought review in the Court of Appeals under Section 19 (b) of the Natural Gas Act, *supra*, p. 2, of an order of the Federal Power Commission (R. 1123–1144) issued in a proceeding on a proposed increase of rates and charges by the Ohio Fuel Gas Company, one of petitioner's suppliers of natural gas at wholesale. Petitioner complained chiefly of the fact that the Commission's order authorized the substitution of a long-term contract-demand rate form for the one-year "average daily demand" method previously used by Ohio Fuel in determining petitioner's demand charge. The Court of Appeals dismissed the petition on the ground that petitioner was not aggrieved by the order, citing its earlier decision in No. 13515, *Cincinnati Gas & Electric Co., et al.* v. *Federal Power Commission*, 246 F. 2d 688. The facts and pertinent issues may be summarized as follows:

The Contract-Demand Rate Form.—The price which petitioner pays for its natural gas is determined on the basis of a two-part rate formula consisting of a demand charge and a commodity charge. The commodity charge is applied to the actual quantity of gas delivered, while the demand charge is designed to compensate the seller for the costs of keeping in readiness facilities and supplies necessary to meet the customer's maximum daily volume of gas. Prior to August 10, 1951, Ohio Fuel used the "average daily demand" method for determining the demand component of petitioner's rate. The "average daily demand" is the highest average daily delivery dur-

ing any month in the 12-month period ending with the current billing month, and is computed by dividing the total volume of gas purchased in a peak month by the number of days in the month. The "contract demand" (CD) form, on the other hand, computes the demand component of the rate on the basis of an agreed-upon estimate of the maximum daily demand of each customer, rather than the average daily demand actually experienced. In either case, of course, the supplier must design its facilities on the basis of estimates furnished to it by its wholesale customers, such as petitioner. The basic difference between the two forms of computing the demand component of the rate is that, under the average demand method, the seller will not recover its costs in warmer than estimated years (when less gas is used), while in colder than estimated years it will recover more than its costs; under the contract-demand form, recovery of costs is more stable and certain.

As a result of the enormous growth in space heating requirements by consumers,[1] peak day sales of gas now depend almost entirely upon the severity of temperature experienced (R. 380–382), and accordingly fluctuate widely, not only from summer lows to winter peaks, but, more importantly, from year to year (R. 1128). In order to minimize the effect of these yearly fluctuations, Ohio Fuel, on September 18, 1953 (R. 573), filed with the Commission a tariff

[1] In 1945, petitioner's residential space-heating customers numbered 14,591 out of a total of 229,383 customers, or a 6.4% saturation (R. 329–330): in 1954, petitioner had 277,617 customers, of which 121,599 were for space heating, or a saturation of 43.8% (*ibid.*).

containing a contract-demand rate form providing for a monthly demand charge of $1.75 per Mcf of billing demand and a 32.5¢ commodity charge for all gas delivered (R. 577–578). The tariff provides that the billing demand for the month shall be the higher of (*a*) the greatest day's aggregate delivery of gas to the buyer during the twelve months ending with the close of the current billing month or (*b*) 90% of the contract demand, but that in no event shall the billing demand exceed the contract demand (R. 578–579). The tariff defines the agreed-upon estimate—the "contract demand"—as the maximum quantity of gas which a buyer is entitled to receive and Ohio Fuel is obligated to deliver on a single day, pursuant to an executed service agreement (usually with a 20-year term) (R. 581).

The principal change effected by the CD rate is that in effect it puts a floor under the billing demand, so that over the life of the service agreement it cannot become less than 90% of the current contract demand. The initiative for the establishment of the contract quantity rests with the buyer, who notifies Ohio Fuel as to the maximum quantity of gas it desires Ohio Fuel to have available for it on a single day (R. 596). The tariff specifies penalties to be imposed upon the buyer for unauthorized takes in excess of the contract quantity, and upon Ohio Fuel for failure to deliver amounts requested by the buyer up to the contract quantity (R. 530). If gas supply and facilities are available, however, the buyer may request an increase in the contract quantity, and the seller, if it is not in a position to meet the request,

must use "due diligence" to supply the necessary facilities and gas supply (R. 597). Conversely, the buyer as a matter of right can reduce the then effective contract quantity 10% over the life of the contract in steps of 5% in one year, and, in addition, buyer and seller may mutually agree to reduce the contract below 90% of the previous contract demand, provided the capacity so released can be otherwise used (R. 537–538).

The Commission's Order.—On June 29, 1956, after extensive proceedings,[2] the Commission issued its findings and order approving the contract-demand rate form substantially as proposed. With respect to that form the Commission made the ultimate findings that—

(1) The contract-demand rate form as proposed by Ohio Fuel is just and reasonable (R. 1129), and

(2) The uniform application of the contract-demand rate form will tend to reduce discrimination among customers (R. 1130).

(3) Further use of the average daily demand rate form would not be in the public interest (R. 1137–1138).

These findings were predicated on subsidiary findings which may be summarized as follows:

(1) The evidence in the record shows the effect of the tremendous increase in the space-heating load by ultimate consumers purchasing gas from the distribution company customers of Ohio Fuel. As an example,

[2] The hearing before the examiner, in which petitioner participated as an intervenor, consumed thirty-seven hearing days; the record comprises approximately 4,600 pages of testimony, 72 exhibits, and 60 items by reference.

the space-heating saturation in the Dayton Power and Light Company's system was approximately 77% in 1955, representing 110,800 residential customers, compared with a 21% saturation in 1946. As a consequence, the peak-day requirements of Dayton and other wholesale customers, as shown by actual expe-ence and as projected into the future, show a comparable increase (R. 1128).

(2) It is characteristic of this space-heating load to fluctuate widely with changing weather conditions. These fluctuations include not only winter peaks and summer valleys, but more importantly, year-to-year variations in peak loads. When demand revenues accruing to Ohio Fuel are made dependent upon actual purchases by the wholesale customers which, in turn, are dependent upon the weather, it is clear that Ohio Fuel will be subjected to a "feast or famine" recovery of costs collected through demand charges. As the space-heating load with consequent high-peak requirement increases, the year-to-year fluctuations in recovery of costs collected through demand charges would become more accentuated by the weather conditions. "In our judgment, a rate form which does not recognize this situation and bring a measure of stability in recovery of those costs collected through demand charges is no longer just and reasonable" (R. 1129).

(3) "The CD rate form, as proposed by Ohio Fuel and which we find just and reasonable under the circumstances of this case, will tend to stabilize recovery of demand charges collected from the distribution company customers" (R. 1129).

(4) The contract-demand rate form will encourage control of peak demands by wholesale customers either

through construction and use of peak-shaving facilities or through use of other means available to them (R. 1129).

(5) The uniform application of the contract-demand rate form will tend to reduce discrimination among wholesale customers (R. 1130).[3]

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[3] In addition to the foregoing findings, the Commission made the following determinations as to the rate level itself, and other matters (R. 1132–1140):

(1) The Commission prescribed rates for two parts of the refund period, *i. e.*, March 1, 1954 through December 1954, and January 1955 through the June 1956 billing month. These rates were arrived at on an average demand basis (R. 1133–1137).

(2) The Commission ordered that, effective with the July 1956 billing month, Ohio Fuel should file revised tariff sheets reflecting rates and charges of $1.56 per Mcf of demand and 32.45¢ per Mcf of commodity based upon a contract demand rate form including the modifications proposed by Ohio Fuel in Exhibit No. 38 (R. 1139). This provision of the order was predicated on the ground that "[c]ontinued billing by Ohio Fuel under the rate form previously prescribed does not give sufficient firmness to the demand revenues nor provide long-term commitments by the customers, both of which are essential for continued financial stability of Ohio Fuel; nor does such billing encourage use of peak shaving by the customers. Therefore, further use of this rate form, prospective from the July 1956 billing month, would not be in the public interest" (R. 1137–1138).

(3) The Commission approved a 6¼% rate of return for the refund periods (R. 1133).

(4) The Commission also held that (R. 1140):

> The record in this proceeding should be reopened for the purpose of taking additional evidence concerning the effect upon rate of return of Ohio Fuel of our approval of the application of the CD rate form to the sales to Ohio Fuel's resale customers. For the purpose of taking this additional evidence this proceeding should be consolidated with the hearing *In the Matter of United Fuel Gas Co., et al.*, Docket No. G-2451, *et al.*, commencing on July 5, 1956.

(5) The Commission sustained the Presiding Examiner's inclusion in the cost of service of $126,979, because of the in-

The Decision Below.—Upon denial of its motion for rehearing before the Commission, petitioner filed a petition for review in the court below. Petitioner alleged, *inter alia,* that the new rate method was in violation of Sections 4 and 5 of the Natural Gas Act, that the Commission's order unlawfully altered the existing contract between petitioner and Ohio Fuel, and that petitioner's electric operations were improperly included within the scope of the long-term commitments imposed by the new rate form. Petitioner contended also that the alleged failure of the Federal Power Commission to answer these contentions violated the provisions of the Administrative Procedure Act. Petitioner did not challenge any part of the Commission's action except the establishment of a long-term period for the contract-demand rate form (see Pet. App. 6a–7a).

The Court of Appeals, citing its earlier opinion in the companion case, No. 13515, *Cincinnati Gas & Electric Co. et al.* v. *Federal Power Commission,* 246 F. 2d 688 (Pet. 2a–14a), dismissed the petition on the ground that petitioner was not presently aggrieved by the order of the Commission (Pet. 1a).[4]

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crease in the 1955 Ohio property tax over the 1954 tax. The order said that, since the adjustment reflects a known cost, its inclusion is reasonable (R. 1132).

[4] In No. 13515, Cincinnati Gas & Electric Company similarly contested an order of the Federal Power Commission approving the institution of a contract-demand rate form for another of its suppliers of natural gas, United Fuel Gas Company. Petitioner raised precisely the same issues in its petition for review in that case as it does in the present suit. The Court of Appeals dismissed the petition, writing an extensive opinion (Pet. App. 2a–14a) in which it considered and rejected each of petitioner's

Petitioner is not aggrieved by the Federal Power Commission's order to which it objects. It alleges no present injury from the order, but is concerned solely with possible future difficulties which may arise as a result of its long-term commitments under the new rate form in the unlikely event that economic disaster were to strike the natural gas industry and the Commission were to refuse relief. Such an improbable contingency is "too speculative to warrant anticipatory judicial determinations" (*Eccles* v. *Peoples Bank*, 333 U. S. 426, 432), particularly since the Commission can at any future time revise the rate form in light of changed economic conditions. Petitioner's lack of aggrievement likewise precludes it from contesting the procedural aspects of the Commission's action. In any case, the Commission's order was proper in the circumstances, and should clearly be upheld on its merits.[5]

1. Section 19 (b) of the Natural Gas Act, *supra*, p. 2, limits the initiation of review proceedings to any party to the Commission's proceedings

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objections to the long-term commitment feature of the contract-demand rate form. In its brief *per curiam* opinion in the present case, the court referred to its opinion in No. 13515, and simply held that this case, "being in all respects identical with that one, is controlled by it" (Pet. App. 1a). Accordingly, our references in the course of this brief to the opinion below are to the opinion in No. 13515, unless otherwise noted.

[5] Despite petitioner's references to *Memphis Light, Gas and Water Division, et al.* v. *Federal Power Commission, et al.*, C. A. D. C., No. 13,666 (in which petitions for certiorari are now pending, Nos. 691, 694, and 695, this Term), this case does *not* present the issues of the *Memphis* case.

"aggrieved" by its order. The decisions of this Court and the lower courts, construing the similar language in other statutes relating to judicial review of administrative action, have established that a person is "aggrieved" only if he sustains substantial direct injury as a result of the order complained of. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 476–77; *American Power & Light Co.* v. *Securities & Exchange Commission*, 325 U. S. 385, 390; cf. *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192; see also *Panhandle Eastern Pipeline Company* v. *Federal Power Commission*, 219 F. 2d 729 (C. A. 3), certiorari denied, 349 U. S. 945; *Mitchell* v. *Covington Mills*, 229 F. 2d 506, 511 (C. A. D. C.) (concurring opinion), certiorari denied, 350 U. S. 1002; *National Coal Ass'n* v. *Federal Power Commission*, 191 F. 2d 462, 464–465 (C. A. 2). This injury "must be something more than nominal or highly speculative" (*National Broadcasting Co.* v. *Federal Communications Commission*, 132 F. 2d 545, 548 (C. A. D. C.), affirmed, 319 U. S. 239); it must be "probable injury of a substantial character" (*ibid.*) which is "traceable with reasonable certainty" to the agency action (*United States Cane Sugar Refiners' Ass'n.* v. *McNutt*, 138 F. 2d 116, 120 (C. A. 2)).[6]

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[6] Thus, the mere fact that petitioner was permitted to intervene in the proceedings below does not confer upon it the right to obtain review of the agency action. In a proceeding like the Ohio Fuel matter, the Commission permits the participation of other natural gas companies, local governmental units and regulatory bodies, and other interested parties. If all of these could be considered "aggrieved," there would result a

To determine whether there was such "probable injury of a substantial character," the court properly looks to the petition for review and its assignment of errors. *Panhandle Eastern Pipeline Company* v. *Federal Power Commission*, 219 F. 2d 729 (C. A. 3); *National Broadcasting Co.* v. *Federal Communications Commission, supra*, 132 F. 2d at 548; *Yankee Network, Inc.* v. *Federal Communications Commission, supra*, 107 F. 2d at 224; *Great Western Broadcasting Ass'n* v. *Federal Communications Commission*, 94 F. 2d 244, 248 (C. A. D. C.). The petition for review in the Court of Appeals in this case demonstrates on its face that petitioner is threatened with no such injury by the aspect of the Commission order which it seeks to challenge. That petition is limited in scope, objecting only to the long-term billing commitment feature of the contract-demand rate form authorized by the Commission's order; it finds no fault with either the rate levels set by the order or the contract-demand rate form itself, so long as it is limited to a one-year commitment (see petitioner's principal brief in the court below, pp. 16, 18, 21; and see *supra*, p. 9).

"hopeless clogging of the administrative process by judicial review" (*National Broadcasting Co.* v. *Federal Communications Commission, supra*, 132 F. 2d at 548); accordingly, review is limited to those who can show "probable injury of a substantial character" (*ibid.*). See Federal Power Commission Rules of Practice and Procedure, 18 C. F. R., Section 1.1 (f) (13); *Panhandle Eastern Pipeline Co.* v. *Federal Power Commission, supra*, 219 F. 2d at 730; *United States Cane Sugar Refiners' Ass'n.* v. *McNutt, supra*; *National Coal Ass'n.* v. *Federal Power Commission, supra*; *Yankee Network, Inc.* v. *Federal Communications Commission*, 107 F. 2d 212, 215 (C. A. D. C.).

Petitioner alleges that the long-term billing commitment adversely affects it in several ways, none of which, we submit, in any way supports its claim that it is presently aggrieved by the order:—

(*a*) Petitioner alleges, first, that the Commission's order is unlawful because it seeks to assure Ohio Fuel minimum demand revenues over a long term, even though petitioner's gas requirements "might substantially decrease due to loss of business to competitive fuels and technologies" (principal brief in Court of Appeals, p. 13). The injury thus anticipated is purely speculative; petitioner does not complain that the long-term billing commitment will have any immediate unfavorable impact upon it, but only that if the natural gas business becomes a "sick" industry, the long term commitment will result in an inequitable financial burden upon petitioner. There is, of course, no evidence that the natural gas industry faces such a fate in the foreseeable future, nor even an allegation that such a debacle is probable. Petitioner's own expert witness considered the gas business to be one of the more stable businesses in this country (p. 3397 of original transcript). There is no justification for adjusting a rate form to the mere "possibility that unanticipated disaster may come to a presently prosperous and stable industry" (opinion of Court of Appeals in No. 13515, Pet. App. 9a).[7] Only an "imme-

[7] Petitioner's reliance on *Market Street R. Co.* v. *Railroad Comm. of California*, 324 U. S. 548, is plainly without merit. In that case, the Court pointed out that the railway company was "a particularly ailing unit of a generally sick industry" (324 U. S. at 554), whose property had been reduced in value by economic forces beyond the possibility of economic repair,

diately pressing" injury—one now existing, or at least demonstrated to be truly a looming threat—constitutes "aggrievement" entitling a petitioner to judicial review. *Eccles* v. *Peoples Bank*, 333 U. S. 426, 432:

> Thus the Bank seeks a declaration of its rights *if* it should lose its independence, or *if* the Board of Governors should reverse its policy and seek to invoke the condition even though the Bank remains independent and *if* then the Directors of the Federal Deposit Insurance Corporation should not change their policy not to grant deposit insurance to the Bank as a non-member of the Federal Reserve System. The concurrence of these contingent events, necessary for injury to be realized, is too speculative to warrant anticipatory judicial determinations. Courts should avoid passing on questions of public law even short of constitutionality that are not immediately pressing. Many of the same reasons are present which impel them to abstain from adjudicating constitutional claims against a statute before it effectively and presently impinges on such claims.

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and accordingly that, in fixing its rate base, historical cost, reproduction cost, and prudent investment are not to be considered. As the court below stated with reference to the *Market Street* decision (Pet. App. 8a):

> This holding would not have applied to the ordinary metropolitan street railway company at the turn of the century, when the industry was flourishing and traction stock had gilt edges, on the mere possibility of a drastically depressing economic change such as occurred with the advent of the automobile. The *Market Street* holding has no application, as the opinion shows, to a dynamic industry which is in the midst of phenomenal growth.

Moreover, even if petitioner's economic forebodings rested on a firmer foundation than they in fact do, petitioner still would have little basis at the present time for contesting the Commission's order. As the court below pointed out (Pet. App. 9a–10a), "* * * the Federal Power Commission is empowered continuously to scrutinize the economic situation of companies subject to its regulation, with authority to act in the public interest at any time, and would of course give immediate consideration to any future complaint of injury through changed conditions." Cf. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 615.

(*b*) Petitioner also claims it is aggrieved in that the order approving the long-term contract-demand rate form unlawfully changes its gas service agreement with Ohio Fuel "without the necessary finding that said agreement adversely affects the public interest under the Natural Gas Act" (principal brief in Court of Appeals, p. 13). Here, too, the only aggrievement which petitioner would suffer, even if the order were unlawful, "is that which might occur if the presently prosperous natural gas industry should fall upon evil times, with the long-term billing commitment still in effect although the Federal Power Commission had been standing by" (opinion below, Pet. App. 13a). As we have pointed out, this remote possibility is not present aggrievement.

(*c*) Finally, petitioner complains of the fact that the long-term commitment improperly extends to the revenues and assets of petitioner's electric operations (principal brief in Court of Appeals, p. 13). Peti-

tioner's fear that its gas department creditors might reach its electric assets and revenues could easily be alleviated, as the court below pointed out (Pet. App. 10a), "by separately incorporating [its] gas and electric businesses, subject to the approval of local regulatory authorities having jurisdiction; that [it has] not done so is the result of [its] own choice." In any event, this danger, like petitioner's other objections, in no sense constitutes present aggrievement; "the electric revenues and assets will not be called upon by gas creditors unless and until the gas industry suffers the sickness of the Market Street Railway, a contingency too remote and speculative to be the basis of rejecting the long-term billing commitment * * *" (Pet. App. 11a).

(*d*) Petitioner's failure to show that it was aggrieved by the Commission's order precludes it from obtaining review of the procedural aspects of the order, as well as its substantive content. Petitioner contends (Pet. 9–14) that, despite the determination that it was not aggrieved, it is nevertheless entitled to review of its claim that the procedure followed by the Commission in rejecting petitioner's objections to the new rate form did not comply with the requirements of the Administrative Procedure Act. The short answer to this contention is that, whether petitioner relies upon Section 19 (b) of the Natural Gas Act or upon Section 10 of the Administrative Procedure Act,[*] it is only entitled to judicial review if it shows

[*] Section 10 of the Administrative Procedure Act, 5 U. S. C. 1009, provides in pertinent part:

> Except so far as (1) statutes preclude judicial review

that it is "aggrieved" by the agency action of which he complains. Section 10, "by its own terms, is made inapplicable in so far as * * * statutes [as here] preclude judicial review * * *" (*Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 500). In the absence of aggrievement, the court below could not consider any of petitioner's attacks on the order, whether directed at its merits or at its procedural aspects.

2. In any event, the same considerations which demonstrate that petitioner is not really aggrieved also show the soundness of the Commission's order on its merits. Petitioner does not challenge the order as it applies today or so long as the natural gas industry continues in a healthy state; this being so, the remoteness of any possible adverse effect, taken together with petitioner's ever-present right to ask the Commission to review and revise the rate form if conditions do change, indicate that the order is a valid and reasonable one. Similarly, the remoteness of injury to petitioner's electric operations—which could occur only in the event of an unexpected and drastic alteration in conditions—shows that the Commission's order is a proper one.

The petition argues (Pet. 10–11) that the Commission did not make any finding on the relationship of the new rate form to the public interest, but, as the

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or (2) agency action is by law committed to agency discretion—

(a) *Right of Review.* Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * * * *

court below points out (Pet. App. 11a–12a), the fact is that the Commission did make the necessary findings that the old form was no longer in the public interest and the new form was just and reasonable. See the Statement, *supra,* pp. 6–8. Nor is there any substance to the contention (Pet. 11–12, 13) that the Commission did not comply with the Administrative Procedure Act in that it failed to answer petitioner's contentions. The Commission's findings and order are sufficiently detailed and specific, and give the Commission's reasons and grounds for its action. See the Statement, *supra,* pp. 6–8, and the opinion below (Pet. App. 4a–6a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
PAUL A. SWEENEY,
ROBERT S. GREEN,
Attorneys.

WILLARD W. GATCHELL,
General Counsel,
HOWARD E. WAHRENBROCK,
Solicitor,
Federal Power Commission.

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